Supreme Court, U.S.
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No. 08-326

In the Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

FRANCIS HANNON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Petitioner, Secretary of the Pennsylvania Department of Corrections, seeks review of a ruling by the Court of Appeals for the First Circuit, allowing him to be sued in Massachusetts for a single discretionary decision he made in Pennsylvania, pursuant to his official duties, about Respondent, a Pennsylvania inmate who was in Pennsylvania at the time. Review is warranted because, by their very nature, long-arm cases against state officials raise sovereignty and federalism concerns that are not present in cases against private parties.

All of Respondent's arguments in his Brief in Opposition to the petition ("Br. in Opp.") are based on the same premise: his particular transfer-related claim is "unique" (*See* Br. in Opp. at 1, 9, 10, 15, 19, 23) and the decision of the Court of Appeals is "narrow" (*See id.* at iv, 1, 9, 15, 17, 18, 19, 23, 25, 26). But what makes this case important is not the underlying details; it is that the Court of Appeals barely noticed Petitioner's status as a state official, and ultimately ascribed no significance to it. The court treated this case like any other – contrary to principles that underlie past decisions of this Court and contrary to the decision-making of other Courts of Appeals that have dealt with long-arm claims against foreign state officials. The implications of the Court of Appeals' decision are far-reaching no matter how limited in scope Respondent's own individual claim against Petitioner may be.

I. This Case Presents An Important And Recurring Issue.

Broadly stated, this case is about how the "minimum contacts" test first articulated in *International Shoe Co. v. Washington*, 326 U.S. 310,

316 (1945) (and refined in subsequent cases) should be applied to a defendant who is a state official from outside the forum state, not a private party or a commercial entity. Respondent insists that his retaliation challenge to his transfer pursuant to the Interstate Corrections Compact (ICC) is unique and that, for that reason, there is nothing noteworthy about the Court of Appeals' fact-driven decision upholding personal jurisdiction – just this once – over the official who made (but did not himself implement) the transfer decision. Respondent, however, can neither obliterate the jurisdictional issue presented here nor transform it into something inconsequential, just by portraying his individual case as unique.

Resolution of personal jurisdiction issues has to be contextual. As the Court observed in *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978), the due process minimum contacts test "is not susceptible of mechanical application; rather the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485-486 & n.29 (1985). Thus, for a personal jurisdiction determination to be fact-specific is the norm. But for present purposes that is beside the point. Following Respondent's argument to its logical conclusion would mean that no personal jurisdiction issue would ever reach the Court.

At any level, the facts must be weighed and analyzed under existing legal rules. And rules evolve. They are subject to fine-tuning when circumstances warrant – as in this case. This is a vehicle by which the Court can clarify how personal jurisdiction principles should apply in long-arm cases against state officials in particular. Respondent's individual case presents that question squarely. The question is

important to states generally, as *amici* – including Massachusetts, the state whose interests the Court of Appeals claimed to be safeguarding, *see* Pet. App. 19a – attest, not only to Petitioner as an individual litigant.

Respondent points to the recent denial of certiorari in three cases that presented similar questions as confirmation that the issue in this petition is unimportant (Br. in Opp. at 13-15). Actually, the fact that three petitions raising related personal jurisdiction issues have been filed in the past two years cuts the other way. How the lower courts should determine whether a state official can constitutionally be sued in a foreign state is an issue that has arisen repeatedly and is bound to arise again. Guidance is needed.

And this case is important because of the implications of the Court of Appeals' decision for cases yet to come, both those involving claims of inmates transferred under the ICC and those arising out of entirely different types of interstate cooperation. Respondent's contention that the decision poses no risk of an upsurge in ICC-related litigation against state officials in foreign states (*see* Br. in Opp., at 22-25) is naïve. Under the Court of Appeals' approach, more long-arm cases, with all the burdens they entail, are inevitable, given prisoners' propensity to file lawsuits, *Cf. Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (recognizing earlier "sharp rise in prisoner litigation"), and given the sheer number of inmates potentially subject to transfer from one jurisdiction to another (*see* Petition, at 2, 10-11).[1]

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[1] Respondent's reliance on *amici's* Table A to suggest that inmates hardly ever sue out-of-state officials is based on a [continued ...]

As for the likelihood that the decision of the Court of Appeals will encourage long-arm lawsuits based on other types of cooperative interstate activity, Respondent's only answer seems to be that, so far, there have not been any other cases like *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 379 (2d Cir. 2005), *cert. denied*, 127 S.Ct. 379 (2006) (*See* Br. in Opp., at 25-26). Respondent's silence about the numerous interstate compacts *amici* have brought to the Court's attention (Brief of *amici*, at 4-12) is deafening. These compacts, which differ markedly from the MSA at issue in *Pryor*, require state officials to reach into other states on a daily basis (and, in so doing, subject themselves to possible litigation). If the Court of Appeals' personal jurisdiction analysis is accepted elsewhere, state officials will have to defend themselves on compact-based claims in foreign jurisdictions on a routine basis. For states, that is an intolerable prospect, and it is legally unsound.

II. The Decision Of The Court Of Appeals Is At Odds With Decisions Of This Court.

Petitioner's argument for review by the Court rests on the premise that government is not commerce, and suits against state defendants differ from suits against non-state parties. Indeed, cases against States and state officials are subject to well-established limitations that have no applicability in other civil matters. Most notably, the Eleventh

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misunderstanding of that table (and the related text, Brief of *amici*, at 3-4). *Amici*'s point was to show that there has *already* been an increase in litigation by ICC-transferred inmates, not to list every such case.

Amendment "serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (internal quotation marks and citation omitted). In their official capacities, state officials can only be sued for prospective injunctive relief, not for damages. *E.g., Kentucky v. Graham*, 473 U.S. 159, 165-167 (1985); *Ex Parte Young*, 209 U.S. 123 (1908). Even when sued in their individual capacities for damages, state officials may be entitled to immunity, *see, e.g., Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Malley v. Briggs*, 475 U.S. 335 (1986), a privilege not shared by private parties, *see Richardson v. McKnight*, 521 U.S. 399, 407-412 (1997).[2] To suggest that the personal jurisdiction calculus may be somewhat different in a case against a state official than it is in a case against a private party is thus neither novel nor untoward.

Respondent dismisses the very idea that there might be a "modified jurisdictional framework" for cases against state officials because the Court has never so held (Br. in Opp. at 11). But the fact that the Court has not resolved this important and recurring issue counsels in favor of review, not against it.

At the same time, Petitioner submits, the Court's existing personal jurisdiction jurisprudence – on sovereignty and federalism, and on the relevance of the "quality and nature" of a defendant's activity – does point in the direction Petitioner urges the Court to go now. *See* Petition, at 12-16. Granting this petition will enable the Court to make explicit what, in Petitioner's view, current caselaw already

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[2] Respondent seeks both damages and injunctive relief in this litigation. *See* Br. in Opp. at 5.

telegraphs (although the Court of Appeals did not agree): modifying the personal jurisdiction inquiry in long-arm cases against state officials is constitutionally justified.

The Court's past personal jurisdiction decisions all involved private parties, and most of them involved traditional tort and contract litigation. Regardless of what facts and "affiliating circumstances" existed in those cases and how they were analyzed, *see Kulko*, 436 U.S. at 92, the notion that the cases allow for state officials to be haled into courts around the county as though they were ordinary commercial litigants is untenable. Such a regime would impose unwarranted extra costs on the provision of state services and would impinge on the sovereignty of states (through their court systems) to police the conduct of their respective officers. Furthermore, as already discussed, interpreting the law in that manner would discourage interstate cooperation in the corrections arena and in other spheres, to the detriment of those concerned and the public as a whole.

On the other hand, analyzing personal jurisdiction slightly differently when state officials are sued in foreign states, to cut back the circumstances under which officials may have to appear and defend themselves outside their home states, would foster predictability for state officials. That, in turn, is what the Due Process Clause calls for: It "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In addition to his general attack on Petitioner's legal theory, Respondent discounts the significance of this Court's *Kulko* decision (Br. in Opp., at 11-13). But *Kulko* is important, and the Court of Appeals' approach conflicts with *Kulko*, in at least three ways.

First, *Kulko*'s focus on the relevance, for personal jurisdictional purposes, of the "quality and nature" of a defendant's activities, *id.* 436 U.S. at 92, supports giving affirmative consideration to a state official's governmental role and the non-commercial nature of what such an official ordinarily does. *See also id.* at 97. Instead of focusing on the qualitative differences between private business and governmental activities, however, the Court of Appeals disregarded them. *See* Pet. App. 10a, 19a.

Second, notwithstanding Respondent's effort to downplay them (*see* Br. in Opp. at 12-13), the parallels between *Kulko* and this case are real, yet the outcomes are opposite. Both *Kulko* and this case concerned a "single act" by the defendant in the defendant's own state. *Id.* at 97. While Mr. Kulko did not initiate his daughter's move to California, he actively facilitated it, *e.g.*, by buying her ticket, *id.* at 87 (and must have anticipated further contact with her after the move); Petitioner did make the decision to "move" Respondent (though he did not carry out the decision himself and would not himself have further contact with Respondent or anyone else in Massachusetts). Mr. Kulko benefited from his daughter's move (his immediate expenses decreased, overall family harmony was fostered, and he could rest assured that his daughter would receive necessary services, such as education and police protection, in California), *see id.* at 94; similarly, Petitioner benefited from Respondent's transfer, *see* Pet. App. 17a. But in *Kulko*, unlike this case, the

Court recognized that, notwithstanding any benefit Mr. Kulko realized, it did not justify subjecting him to the burden and strain of litigating a subsequent dispute in a distant state. *Id.* at 97. Though California retained "substantial interests" in the well-being of its minor residents, that was not controlling for jurisdictional purposes. *See id.* at 98. By the same token, whatever interest Massachusetts has in protecting the rights of those housed in its prisons, *see* Pet. App. 19a, it should not have affected the Court of Appeals' decision here.

And third, the Court made clear in *Kulko* that one must not "confuse[] the question of [a party's] liability with that of the proper forum in which to determine that liability." *Id.* at 96. Here, in contrast, the Court of Appeals justified the assertion of personal jurisdiction over Petitioner in part by assuming that he acted improperly. *See* Pet. App. 17a, 19a.

III. The Decision of the Court Of Appeals Cannot Be Reconciled With Those Of Other Circuits.

A commercial defendant's lack of physical presence in the forum State does not automatically defeat personal jurisdiction there. *Burger King*, 471 U.S. at 476. This stems from the nature of "modern commercial life." *Ibid.* The nature of state officials' work is different. Cases against state officials therefore should be, and are, different. Except for the decision in this case, no Court of Appeals has upheld long-arm jurisdiction over a foreign state official, in any kind of case, unless the defendant official traveled to the forum state for case-related reasons. *See*

Petition, at 16-21. Respondent cannot and does not say otherwise.[3]

Respondent of course tries to minimize the divergence between the decision here and the decisions in other long-arm cases involving state officials (Br. in Opp. at 15-22). Incidental factual differences between one prisoner case and another cannot explain why, until now, not one transferred prisoner in the country has been allowed to sue home state prison officials in another state, on any theory. *See* Pet. App. 15a.[4]

If the legal standards applicable in cases against state officials were as clear and well understood as Respondent suggests, the Court of Appeals' "relatedness" rationale for allowing Respondent's supposedly unique claim against Petitioner to go forward, *see* Pet. App. 15a-16a, should also have been dispositive in *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir.), *cert. denied*, 129 S.Ct. 63 (2008),

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[3] Even if long-arm jurisdiction over a state official who never set foot in the forum state might be appropriate in some extraordinary, yet-to-arise situation, there was no basis to so find here.

[4] In trying to distinguish *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006), Respondent points to the Court of Appeals' observation, Pet. App. 20a, that Massachusetts counsel was appointed for him well after suit was filed, and this action had been pending much longer than *Trujillo* before the district court addressed personal jurisdiction (Br. in Opp. at 18). But a distinction based on such post-suit developments, which Petitioner could not have foreseen or taken into account, is contrary to this court's precedents. *See World-Wide Volkswagen*, 444 U.S. at 297; *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (court does not acquire personal jurisdiction "by being the 'center of gravity' of the controversy, or the most convenient location for the litigation").

but it was not. *Id.* at 487. Unlike the First Circuit, the Fifth Circuit gives due weight to the sovereignty and federalism concerns that ought to limit the assertion of personal jurisdiction over foreign state officials. *See also Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008), *cert. denied*, ---S.Ct.--- (U.S. Oct. 20, 2008); *Burstein v. State Bar of California*, 693 F.2d 511, 522 (5th Cir. 1982).

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For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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